84-1346

Office-Supreme Court, U.S.
FILED
FEB 22 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

PAUL HEINRICH,
Appellant,

vs.

THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

William P. Marshall
(Counsel of Record)
Marshall-Wythe School of Law
College of William and Mary
Williamsburg, Virginia 23185
Telephone: (804) 253-4143
Attorney for Appellants

Of Counsel:

Jeffrey M. Shaman
DePaul University College
of Law
25 E. Jackson Blvd.
Chicago, Illinois 60604

Geoffrey R. Stone
1111 E. 60th Street
Chicago, Illinos 60637

CASILLAS PRESS INC. - 1717 K STREET WASH DC - 223-1220

47

QUESTIONS PRESENTED

I. Whether the First Amendment permits a State to criminally proscribe *true* statements of fact as defamation?

II. Whether the First Amendment permits a state to criminally proscribe *true* statements of fact as fighting words or breach of peace where the speech was not uttered in face-to-face confrontation?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE
1. Background 4
2. When and How the Federal Questions Were Raised and Decided Below 5

THE QUESTIONS ARE SUBSTANTIAL
I. The First Amendment Requires That Truth Be A Defense To A Criminal Prosecution For Defamation 6
II. The Statute Is Not Sustainable As A Regulation Aimed At Fighting Words Or Breaches Of The Peace Since It Proscribes Truthful Statements And Prohibits Speech In Situations Where A Breach of Peace Is Not Imminent 9
A. Fighting Words 9
B. Breach of the Peace 11

CONCLUSION 16

APPENDICES

A. Opinion and Decision of the Supreme Court of the State of Illinois 1a

B. Memorandum Opinion and Order of the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois. 13a

Page

C. Judgement from which appeal is sought 17a

D. Notice of Appeal 18a

E1. Criminal Information (Count I) 19a

E2. Criminal Information (Count II) 23a

TABLE OF AUTHORITIES

Cases: Page

Abrams v. United States, 250 U.S. 616 (1919) 8

Beauharnais v. Illinois, 343 U.S. 250 (1952) 12, 13

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 10, 14, 15

Cohen v. California, 403 U.S. 15 (1971) 11-15

Collin v. Smith, 578 F.2d. 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) 12

Cox v. Louisiana, 379 U.S. 536 (1965) 14

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) 7

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 8

Edwards v. South Carolina, 372 U.S. 229 (1963) 14

Feiner v. New York, 340 U.S. 315 (1951) 14, 15

Garrison v. Louisiana, 379 U.S. 64 (1964) 6, 11-13

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 7

Ginsberg v. New York, 390 U.S. 629 (1968) 8

Page

Gitlow v. New York, 268 U.S. 652 (1925) 8

Gooding v. Wilson, 405 U.S. 518 (1972) 10, 11, 13-15

Gregory v. Chicago, 394 U.S. 111 (1969) 14

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 8

New York Times v. Sullivan, 376 U.S. 254 (1964) 6-8, 13

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 13

People v. Heinrich, 104 Ill. 2d 137, 470 N.E.2d 966 (1984) 1, 5

Plummer v. City of Columbus, 414 U.S. 2 (1973) 10, 13

State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941), *aff'd*, 315 U.S. 568 (1942) 10

Street v. New York, 394 U.S. 576 (1968) 16

Terminiello v. Chicago, 337 U.S. 1 (1949) 13

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 7

Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973) 12

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 8

Winters v. New York, 333 U.S. 507 (1948) 13

Constitutional Provisions:

U.S. Const. amend I ..... *passim*

U.S. Const. amend. XIV 4

Page

Statutory Provisions:

28 U.S.C. § 1257(2) (1982) 2

Ill. Rev. Stat. ch. 38, § 26 (1981) 10

Ill. Rev. Stat. ch. 38, § 27 (1981) ..... *passim*

Articles:

Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 887 (1963) 11-12

Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393 (1978) 8

Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982) 8

Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983) 15

IN THE

Supreme Court of the United States

October Term, 1984

PAUL HEINRICH,
Appellant,

vs.

THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Supreme Court of the State of Illinois dated September 20, 1984 holding the Illinois Criminal Defamation Statute, Ill. Rev. Stat. ch. 38, § 27 (1981), valid under the First Amendment of the United States Constitution. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 104 Ill. 2d 137, 470 N.E.2d 966 (1984). The text of this opinion is set forth in Appendix A. The Memorandum Opinion and Order of the Circuit Court of the Eleventh

Judicial District of the State of Illinois is not reported. The text of the Memorandum Order and Opinion is set forth in Appendix B.

JURISDICTION

This case involves a two count misdemeanor prosecution under the Illinois Criminal Defamation Statute, Ill. Rev. Stat. ch. 38, § 27 (1981), alleging that the defendant defamed an individual by leaflet and letter in violation of this statute. Defendant was charged by criminal information on May 11, 1983 in the Circuit Court of the Eleventh Judicial District of the State of Illinois.

Defendant moved to dismiss the criminal information on the grounds that the statute under which it was brought was violative of the first amendment. This motion was granted by the Circuit Court in a written Memorandum Opinion and Order dated October 14, 1983.

The State appealed this dismissal in a direct appeal to the Illinois Supreme Court. On September 20, 1984 the Illinois Supreme Court reversed the Circuit Court, held the statute constitutionally valid and remanded for further proceedings. Defendant petitioned for rehearing; on November 30, 1984 the Illinois Supreme Court denied the petition. A Notice of Appeal to this Court was filed February 5, 1985. The jurisdiction to review the decision of the Illinois Supreme Court is conferred by Title 28 U.S.C. Section 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of the First Amendment to the Constitution of the United States is as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The full text of the Illinois Criminal Defamation Statute, Ill. Rev. Stat. ch. 38, § 27 (1981), is as follows:

Article 27. Criminal Defamation.

27-1 Elements of the Offense.

(a) A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace.

(b) Sentence.
Criminal defamation is a Class A misdemeanor.

27-2. Justification.

In all prosecutions for criminal defamation, the truth, when communicated with good motives, and for justifiable ends, shall be an affirmative defense.

STATEMENT OF THE CASE

1. Background

On May 11, 1983, the defendant was charged by informaton with two counts of criminal defamation under Section 27-1 of the Illinois Revised Statutes ch. 38. Count I alleged that the defendant defamed an individual by communicating to third persons (the general public) by leaflet and letter material claiming that the complainant was an unfit mother due to her promiscuity, deviant sexual behavior, and drug use. The leaflet urged its readers to relate the complainant's unfitness to church groups or the Illinois Department of Children and Family Services. Count II alleged that the defendant defamed the complainant by mailing to a third person (the complainant's mother), a letter which identified the complainant as a ruined women and a person excommunicated from the Catholic church. The letter also contained epithets addressed to the complainant's mother, which were not the subject of the criminal information.

Defendant has at all times asserted the truth of his statements concerning the complainant. The Illinois Criminal Defamation Statute, however, allows only a "qualified truth" defense; that is, the defendent must show good motivation as well as truth. Arguing that the Illinois statute was therefore overbroad, the defendant moved to dismiss the criminal information in the trial court. Pursuant to this motion, the trial court dismissed the information and declared the criminal defamation statute unconstitutional on the grounds that it criminally proscribed truthful speech in violation of the first and fourteenth amendments to the United States Constitution.

The Illinois Supreme Court reversed in an opinion that

is not free from ambiguity. The decision of the Illinois Supreme Court, albeit obscure in some respects, is clear in at least the following: First, a conviction under the Illinois Criminal Defamation Statute can stand regardless of the truth or falsity of the defendant's statements. *People v. Heinrich,* 104 Ill. 2d 137, 150, 470 N.E.2d 966, 972 (1984). Second, it may be upheld even if the defamatory words a) are substantive statements as opposed to epithets, b) are not uttered face to face with the person defamed and c) are not directed to the person receiving the communication. Section 27-1 requires only that the defamatory matter be communicatd by any means to any person.

Defendant petitioned for rehearing seeking both clarification of the opinion and reversal. The Illinois Supreme Court summarily dismissed the petition.

2. When And How The Federal Questions Were Raised And Decided Below

The question of the constitutionality of the Criminal Defamation Statute under the first amendment was initially raised in defendant's motion to dismiss before the trial court. The trial court granted this motion. On appeal the Illinois Supreme Court reversed.

THE QUESTIONS ARE SUBSTANTIAL

The case places squarely before this Court the issue of whether the first amendment permits a state to criminally proscribe true statements of fact as defamation. The Illinois Criminal Defamation Statute, Ill. Rev. Stat. ch. 38, § 27 (1981), under which the defendant was charged, grants only a "qualified truth" defense which requires that the defendant must show that his statements were truthful and made with good motivation. In upholding the statute, the Illinois Supreme Court held that truth alone is not a sufficient defense to defamation. This holding ignores the decisions of this Court which have held that a truth defense to defamation is constitutionally mandated. Indeed the opinion disregards the central premise of the first amendment – that the freedom of speech is designed to promote the search for truth.

This case also brings before the Court the issue of the circumstances in which the state's interest in protecting the peace can support the proscription of truth. After construing the Criminal Defamation Statute as a measure designed in part to protect the peace, the Illinois Supreme Court held that it was constitutional because it regulated speech of only "slight" first amendment value that posed an "immediate" threat to the peace. The Illinois Supreme Court's conclusions as to what constitutes "slight" first amendment value and what constitutes an immediate threat to the peace, however, do not conform to the decisions of this Court. Truthful statements have more than only "slight" first amendment value. Statements communicated by "any means to any person," including those not uttered in face-to-face confrontation nor stated in the presence of the person to whom they are dircted do not pose an "immediate" threat to the peace. The decision of the Illinois Supreme Court should be reversed.

I. THE FIRST AMENDMENT REQUIRES THAT TRUTH BE A DEFENSE TO A CRIMINAL PROSECUTION FOR DEFAMATION.

The decisions of this Court unequivocally hold that truth is an absolute defense in both civil and criminal defamation where a public official or public figure is defamed. See *New York Times v. Sullivan,* 376 U.S. 254 (1964) (civil); *Garrison v. Louisiana,* 379 U.S. 64 (1964) (criminal).

The Illinois Supreme Court erroneously maintained that this protection does not extend to defamation of non-public figures. This Court's decisions, however, indicate that falsity is an essential element even with respect to defamation of non-public figures. In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), this Court explained that although liability in a non-public figure defamation case could be based on a lesser standard than in a public figure case, liability must be predicated on "defamatory falsehood." In rejecting this conclusion, the Illinois Court relied on dicta in *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975), a privacy case, in which this Court stated that it had never held truth to be a complete defense in all instances. Any ambiguity in *Cox,* however, was subsequently erased in *Time, Inc. v. Firestone,* 424 U.S. 448 (1976) where this Court stated that the "demonstration that an article was true would seem to preclude finding the publisher at fault." 424 U.S. at 458, (citing *Cox Broadcasting v. Cohn,* 420 U.S. at 498-500 (Powell, J. concurring)).

Indeed, although *Gertz* makes apparent that truth is a defense in a civil action for defamation, it is absolutely certain that truth is a defense where, as here, the action is criminal. In *Gertz* this Court held that even a private plaintiff could not recover *punitive* damages for defama-

tion unless the actual malice standard of *New York Times* was satisfied. 418 U.S. at 349. That requirement is conclusive here. The purpose of punitive damages, like that of the criminal law, is to punish the defendant and deter future actions. *Gertz,* 478 U.S. at 350. As criminal liability is at least as severe as punitive damages, the actual malice standard for liability must be met. In not recognizing truth as a defense, the challenged statute is constitutionally infirm.

There are important policy reasons, moreover, other than stare decisis for recognizing the truth defense in defamation actions involving even non-public figures. First, there is the inherent value of truth itself. The search for truth has been construed as a central policy of the first amendment. *New York Times v. Sullivan,* 376 U.S. 254. The exchange of truthful information forms our awareness and provides us with the knowledge useful to making informative and beneficial decisions. Our need for truth, as this Court has recognized, does not end with public issues. This Court has frequently noted the value of speech in advancing "'truth, science, morality and arts in general' as well as responsible government." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 147 (1967). See *Monitor Patriot Co. v. Roy,* 401 US. 265, 275 (1971); *Ginsberg v. New York,* 390 U.S. 629, 649 (1968); *Gitlow v. New York,* 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Homes, J., dissenting). In this respect, the truth we know about our neighbors may be as useful to our own day-to-day decisions as the truth of what is occuring in Washington or New York. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976); Posner, *The Right of Privacy* 12 Ga. L. Rev. 393 (1978); Redish, *The Value of Free Speech,* 130 U. Pa. L. Rev. 591 (1982).

Second, the protection of all truthful statements works as a prophylactic device similar to the protection of certain false statements required by *New York Times v. Sullivan.* In *Sullivan,* the Court recognized that even some false statements deserve protection in order to give the exposition of truthful statements room to develop without inhibition. The Court was especially wary of self-censorship. In much the same way, and even more dramatically, operating room should be granted to truthful statements. To hold otherwise would lead to self-censorship, for individuals would be forced to determine which of their true statements are worthy or unworthy of first amendment protection.

Third, prohibiting the truthful speech in this case would make unlawful much of our everyday discourse. Although this defendant may have been extravagant in his methods of communication, the type of message which he communicated is commonplace. To make this conversation criminal is to place everyday social discourse at the mercy of the state's police power.

II. THE STATUTE IS NOT SUSTAINABLE AS A REGULATION AIMED AT FIGHTING WORDS OR BREACHES OF THE PEACE SINCE IT PROSCRIBES TRUTHFUL STATEMENTS AND PROHIBITS SPEECH IN SITUATIONS WHERE A BREACH OF PEACE IS NOT IMMINENT

The Illinois Supreme Court construed the Criminal Defamation Statute, which required only that the defamation "tends to provoke a breach of the peace" as requiring that the defamatory words must tend to produce an *immediate* breach of peace. Such window dressing does not cure the statute.

A. Fighting Words

In interpreting the Illinois Criminal Defamation Statute, the Illinois Supreme Court referred to the "fighting words" doctrine. It did not, however, construe the Criminal Defamation Statute as a Fighting Words statute, and the statute cannot be sustained on that basis. First, if the Court construed the statute as limited solely to fighting words, its subsequent discussion of the non-public figure defamation cases would be irrelevant. Second, a pure fighting words construction would render the statute superfluous, for the Illinois Disorderly Conduct Statute, Ill. Rev. Stat. ch. 38, § 26 (1981), is directed at fighting words. Third, even if the statute is directed at fighting words, it is nonetheless unconstitutional because it proscribes truthful statements without conforming to this Court's fighting words doctrine.

The differences between criminal defamation and fighting words are obvious. The fighting words doctrine applies to personal epithets; criminal defamation applies to substantive statements. To expand the fighting words doctrine to cover truthful statements that cannot in any sense be described as epithets, expands the doctrine well beyond its historical and theoretical limits.[1] The fighting words doctrine governs speech that has only "slight" first amendment value. While this notion may be valid as applied to personal epithets, it is wholly inapplicable to truthful substantive statements. See *supra* pp. 6-8. The Illinois Supreme Court cannot escape this constitutional difficulty simply by labeling criminal defamation "fighting words." Compare *Plummer v. City of Columbus,* 414

[1]The question of whether truth should be a defense to a fighting words conviction was in issue before the state supreme court in *State v. Chaplinsky*, 91 N.H. 310, 18 A.2d 754 (1941), but was not a part of the decision of this Court. *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

U.S. 2 (1973) (per curiam); *Gooding v. Wilson,* 405 U.S. 518 (1972).

Moreover, even if the fighting words doctrine may be applied to true statements of fact that do not constitute epithets, the statute at bar is unconstitutional because it fails to adopt the other necessary elements of the doctrine that this Court has carefully designated. This Court has made clear, for example, that the fighting words doctrine requires that the words be uttered face-to-face to the person of the hearer. *Gooding v. Wilson,* 405 U.S. 518; *Cohen v. California,* 403 U.S. 15 (1971). The Illinois Criminal Defamation Statute, however, expressly authorizes liability for communicating defamatory material *"by any means to any person."* Indeed the statute goes so far as to authorize liability for the defamation of a *dead* person. § 27-1. The statute clearly is not limited to face-to-face confrontation with the person defamed. Indeed, in this very case the defendant was charged with communicating the purportedly defamatory material to the general public by letter or posted display of a leaflet and by mail to the complainant's mother. Neither of these actions constitutes "fighting words". The decision of the Illinois Supreme Court cannot be defended in terms of the "fighting words" doctrine.

B. Breach of the Peace

Similarly, the Illinois Criminal Defamation Statute may not be sustained as a regulation designed to prevent breach of the peace. As this Court stated in *Garrison v. Louisiana,* 379 U.S. 64, 69 (1964):

> Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions,

> when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation." Emerson, Toward A General Theory of the First Amendment, 72 Yale L.J. 877, 924 (1963).

In rejecting the teachings of *Garrison,* the Illinois Supreme Court relied on *Beauharnais v. Illinois,* 343 U.S. 250 (1952). Although *Beauharnais* has not been explicitly overruled, it has been carefully confined by subsequent decisions of this Court. Indeed, in no case since *Beauharnais* has this Court upheld a breach of peace conviction under the criminal libel doctrine. *See, e.g., Garrison v. Louisiana,* 379 U.S. 64 (1964); *see also Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978), *cert. denied,* 439 U.S. 916 (1978); and *Tollett v. United States,* 485 F.2d 1087, 1094 n.14 (8th Cir. 1973) (suggesting *Beauharnais* to be of doubtful validity in light of this Court's subsequent decisions.)

The fundamental premise of *Beauharnais* is that utterances that offend our sensibilities are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 343 U.S. at 257.

This Court has since recognized, however, that some offense to sensibilities is a necessary by-product of our first amendment liberties. As the Court stated in *Cohen v. California* 403 U.S. at 25:

> That the air may at times seem filled with verbal cacophony is, . . . not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a

> privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters v. New York,* 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971).

See Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (holding that speech must be "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest); *Plummer v. City of Columbus,* 414 U.S. 2, 3-4 (1973) (per curiam) (overturning conviction for use of "a series of absolutely vulgar, suggestive and abhorrent sexually-oriented statements" directed at a female); *Gooding v. Wilson,* 405 U.S. 518 (1972); *see also New York Times v. Sullivan,* 376 U.S. 254 (1964), *Garrison v. Louisiana,* 379 U.S. 64 (1964) and their progeny (holding that false statements not uttered with actual malice could not be proscribed.)

Moreover, even if subsequent cases had not eroded *Beauharnais,* the expression in this case is not of slight value.[2] At issue in this case are truthful statements. It cannot be argued that the value of truthful statements is "slight" in the search for truth.[3] See *supra* pp. 6-9. In pro-

---

[2]It is, of course, axiomatic that the value of the expression does not depend on the motivation of the speaker. *See Garrison* 379 U.S. 64; *Cohen,* 403 U.S. 15.

[3]In *Beauharnais* the Court did hold that a qualified truth defense was constitutionally permissible, but that holding is diluted given that insufficient factual support was presented (or plausible) to substantiate the defendant's racist assertions. 343 U.S. at 266. The

scribing such statements, the Illinois statute proscribes speech of far more important value than the epithets and false statements that this Court has held constitutionally unprotected in other contexts.

Finally, even if a narrowly drawn criminal libel statute could be sustained on a breach of peace rationale, it is clear that the Illinois Criminal Defamation Statute does not approach the type of statute that the first amendment requires. Even in the context of fighting words, where the speech *is* of "slight" social value, the Court permits restrictions only when the words are so provocative that a reflexive physical response against the speaker is likely. As part of this requirement the Court requires face-to-face confrontation between the speaker and the person defamed. Without this proximity between speaker and addressee the reaction time is delayed and the rationale for regulation evaporates. *Cohen,* 403 U.S. 15; *Gooding,* 405 U.S. 518. Indeed, these requirements are so stringent that the last time the Supreme Court upheld a fighting words conviction was in its 1941 decision in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), the case that announced the doctrine.

Outside the fighting words context, the Court is even more reluctant to sustain a restriction on speech based on a breach of peace rationale. It has not upheld such a prosecution since its 1951 decision in *Feiner v. New York,* 340 U.S. 315 (1951), and in that case the Court found the defendant "undertook incitement to riot." In cases since *Feiner,* the Court has refused to uphold the restrictions on speech even when the defendant was faced with hostile audiences and the threat to the peace was decidedly real. *See*

Court also suggested that the qualified truth defense was supported by "a century and a half" of criminal libel prosecutions. In *Garrison v. Louisiana,* the Court rejected this "century and one-half of teachings." 379 U.S. at 74.

Cox v. Louisiana, 379 U.S. 536 (1965); *Edwards v. South* Carolina, 372 U.S. 229 (1963); *Gregory v. Chicago,* 394 U.S. 111 (1969).

The Illinois Criminal Defamation Statute is obviously not limited to the extraordinary circumstances presented in *Chaplinsky* or *Feiner.* Although the Illinois Supreme Court attempted to construe the statute as prohibiting only those words which tend to provoke an "immediate" breach of peace, its conception of "immediate" does not comport with decisions of this Court. The statute explicitly prohibits any defamation that is communicated "by any means to any person." This language has not been construed as requiring face-to-face confrontation, and indeed had the Illinois Supreme Court attempted to construe the statute in this manner it would have had to dismiss the indictment of this case because no confrontation occurred. Defendant's speech was communicated only by letter and by posted display of a leaflet.

The decisions of this Court, on the other hand, hold that the absence of a requirement of confrontation is fatal. Reflexive responses and riots obviously do not occur when there is no face-to-face confrontation. See *Gooding,* 405 U.S. 518; *Feiner,* 340 U.S. 315. Moreover, the strict requirements of confrontation are not met unless the words are directed to the persons addressed, another requirement obviously ignored by the challenged statute, which reaches even the defamation of a dead person. Cf. *Cohen v. California,* 403 U.S. 15. The statute is overbroad at best.

The extraordinary limitations on government efforts to suppress speech on the ground that it may trigger a hostile audience response are well justified. To permit suppression of expression because it may anger others and lead them to react in a violent manner is fundamentally incom-

patible with the central premises of the first amendment. *See* Stone, *Content Regulation and the First Amendment,* 25 Wm. & Mary L. Rev. 189 (1983). This "heckler's veto" invites intolerance and creates the risk that under the rubric of protecting the peace the state will actually proscribe speech because of its offensiveness and not because of the possibility of violent retaliation. *Street v. New York,* 394 U.S. 576, 592 (1969). This is exactly what has occurred in this case. The defendant is being prosecuted for the content of his words rather than any imminent breach of peace. The statute as written, construed, and applied is unconstitutional.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Dated: February 22, 1985

Respectfully submitted,

William P. Marshall
Marshall-Wythe School of Law
College of William and Mary
Williamsburg, Virginia 23185

Of Counsel: Jeffrey M. Shaman
DePaul University
College of Law
25 E. Jackson Blvd.
Chicago, Illinois 60604

Of Counsel: Geoffrey Stone
1111 E. 60th Street
Chicago, Illinois 60637

APPENDIX A

FILED
Sep 20 1984
Clerk Supreme Court
Illinois

Docket No. 59239—Agenda 11—May 1984.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. PAUL HEINRICH, Appellee.

JUSTICE MORAN delivered the opinion of the court:

Defendant, Paul Heinrich, was charged by information in McLean County with two counts of criminal defamation under the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 27—1). He moved to dismiss the information, and after a hearing, the circuit court declared the criminal defamation statute unconstitutional and dismissed the charges. The court held the statute contravened the first and fourteenth amendments to the United States Constitution. The State appeals directly to this court pursuant to our Rule 603 (87 Ill. 2d R. 603).

This appeal posits three questions to be resolved: (1) Is section 27—1 of the Criminal Code of 1961 overly broad? (2) Is section 27—2 unconstitutional in that it does not allow truth to be an absolute defense in a criminal defamation prosecution? and (3) Can the alleged infirmity be cured by severing section 27—2?

In count I of the information, the State alleged that the defendant, while acting with the intent to defame the complainant, communicated to members of the general public matters which tended to provoke a breach of the peace. The defendant distributed this material by mailing and by posting, in public view, a leaflet. More specifically, the leaflet stated that the complainant was an unfit mother due to her promiscuity, deviate sexual behavior, illicit drug habit, and four pregnancies out of wedlock. The leaflet further stated that the woman's first pregnancy,

which resulted in the birth of her daughter, was followed by two clinical abortions and a miscarriage. A picture of the complainant appeared in the upper right-hand corner of the leaflet, with her name in large type underneath it. The leaflet also named the complainant's parents and gave their address. The names of the complainant, both her parents and her daughter were all emphasized in large type wherever they appeared in the leaflet. This leaflet urged concerned citizens to contact their local church groups or the Illinois Department of Children and Family Services in order to help protect the complainant's "bastard child" from her mother's "deviate moral behavior."

In count II of the information the State alleged that defendant, with the intent to defame, communicated to the complainant's mother, by letter, matter which tended to provoke a breach of the peace. The letter described the complainant as a whore, a ruined woman, and a girl who had been excommunicated from the Catholic church for murdering human life. The letter also venomously attacked the complainant's mother, calling her the "mother of a whore" the "grandmother of a bastard," and "white trash." A copy of the leaflet, described in count I, was enclosed with the letter. The defendant signed the letter and in closing stated:

> "I hope to God you take me to court for distributing the enclosed newsletter * * *
>
> Better yet, come after me and you can rot in jail for the rest of your miserable life."

The State contends that section 27—1 of the criminal defamation statute, under which this defendant was charged, is constitutional as it is designed to reach only those words tending to cause a breach of the peace. The State further argues that section 27—2 of the statute (Ill. Rev.

Stat. 1981, ch. 38, par. 27–2), which provides for the defense of truth when the alleged defamation is published with good motives and for justifable ends, does not conflict with a defendant's first amendment rights in the discrete area of private defamation. Alternatively, if this court finds section 27–2 objectionable, the State suggests that we sever only that portion and retain section 27–1.

The defendant maintains that the criminal defamation statute is overly broad. He posits that a tendency to breach the peace is a justification for regulating speech only when the resultant breach of the peace is imminent. Since there is no requirement of immediacy in section 27–1, the defendant requests our affirmance of the trial court's dismissal. In the event that we do not find section 27–1 invalid, the defendant submits that section 27–2 renders the entire statute unconstitutional becaues it does not allow truth to be an absolute defense in a criminal defamation prosecution. According to the defendant, section 27–2 is not severable.

The trial court did not make an explicit finding that the statute was too broad, as defense counsel had urged. Rather, it ruled the statute unconstitutional on the basis of the qualified-truth defense contained in section 27–2. The court further found that the offending portion of the statute could not be severed, thereby saving section 27–1. The court reasoned that to do so would be tantamount to redrafting the criminal defamation statute in accordance with first amendment requirements. Although the trial court ultimately rejected severance as a viable alternative to striking the entire statute, the court's reasoning implies that section 27–1, itself, was not constitutionally overly broad. We agree.

The historical justification for criminal libel has been its

tendency to provoke a breach of the peace. (*Garrison v. Louisiana* (1964), 379 U.S. 64, 67-68; 13 L. Ed. 2d 125, 129, 85 S. Ct. 209, 212; *Beauharnais v. Illinois* (1952), 343 U.S. 250, 254, 96 L. Ed. 919, 926, 72 S. Ct. 725, 729; *People v. Spielman* (1925), 318 Ill. 482, 489.) The legislation in question incorporates this rationale as it provides:

> "Sec. 27—1. Elements of the Offense.
>
> (a) A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter *which tends to provoke a breach of the peace.*" (Emphasis added.) Ill. Rev. Stat. 1981, ch. 38, par. 27—1.

From the language of the statute itself, as well as the committee comments which follow and explain the statute, it is clear that the legislature intended section 27—1 to apply only to those words having a direct tendency to cause acts of violence.

The committee comments to section 27—1 state:

> "The section specifically requires that the defamatory matter tend to provoke a breach of the peace. The utterance need not actually provoke violence or criminal acts, but it is sufficient if it tends to do so.*** The inclusion of this element removes from the criminal area any defamatory conduct which does not tend to incite crime even though that conduct may seriously injure reputation." (Ill. Ann. Stat., ch. 38, par. 27—1, Committee Comments, at 173 (Smith-Hurd 1977).)

Further, the comments specifically characterize the type of communication that is proscribed by section 27—1 as "fighting words" and refers the reader to *Beauharnais v. Illinois* (1952), 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 725.

In *Beauharnais,* the defendant was convicted under section 224a of the Criminal Code of 1874 (Ill. Rev. Stat. 1949, ch. 38, par. 471) (repealed by act approved July 28, 1961). That statute, which immediately preceded the one currently under review, criminalized the exhibition in any public place of matter which portrayed, "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which *** expose[d] the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which [was] productive of [a] breach of the peace or riots." (Ill. Rev. Stat. 1949, ch. 38, par. 471.) This court described the former statute as a form of criminal libel law and found that "[a] mere reading of the libelous publication in question *** refers to Negroes as a class possessing various criminal tendencies, unchastity, and degrading sexual inclinations, all of which are 'fighting words' liable to cause violence and disorder between the races." *People v. Beauharnais* (1951), 408 Ill. 512, 517.

The United States Supreme Court affirmed the judgment of this court in *Beauharnais v. Illinois,* stating:

> " 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite to an *immediate breach* of the peace. ***' " (Emphasis added.) 343 U.S. 250, 255-56, 96 L. Ed. 919, 926-27, 72 S. Ct. 725, 730-31.

Although the court in *Beauharnais* stated that libelous words were outside the protection of the first amendment,

subsequent Supreme Court decisions evidence that the guarantees of the first amendment do place some limitation on a State's power to proscribe defamation. (See *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (civil); *Garrison v. Louisiana* (1964), 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209 (criminal); *Gertz v. Welch* (1974), 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (civil).) The extent of these limitations will be discussed below. At this point, it suffices to note that the reference to *Beauharnais* in the committee comments to section 27—1 concerns the use "fighting words" not "libelous" words. Although *Beauharnais* has been criticized in regard to statements therein concerning libel (see *Collin v. Smith* (7th Cir. 1978), 578 F.2d 1197, 1205; *United States v. Handler* (Md. 1974), 383 F. Supp. 1267, 1277; *Tollett v. United Staes* (8th Cir. 1973), 485 F.2d 1087, 1094 n.14; *Anti-Defamation League of B'nai B'rith v. Federal Communications Com.* (D.C. Cir. 1968), 403 F.2d 169, 174 n.5), the court's position on "fighting words" appears to have retained validity. *Cohen v. California* (1971), 403 U.S. 15, 20, 29 L. Ed. 2d 284, 291, 91 S. Ct. 1780, 1785-86. See generally Annot., *Supreme Court's View As To The Protection Or Lack of Protection, Under the Federal Constitution, Of The Utterance of "Fighting Words,"* 39 L. Ed. 2d 925 (1974).

In discussing the protection afforded "fighting words," the *Beauharnais* court stated:

> " ' *** It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "*Resort to epithets or personal abuse is not in any proper sense com-*

munication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." [Citation.]' " (Emphasis added.) *Beauharnais v. Illinois* (1952), 343 U.S. 250, 256-57, 96 L. Ed. 919, 927, 72 S. Ct. 725, 731.

The reference to *Beauharnais* in the committee comments, then, makes plain the legislative intent that section 27—1 applies only to "fighting words." Such "fighting" words are those personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, are inherently likely to provoke violent reaction. (*Cohen v. California* (1971), 403 U.S. 15, 20, 29 L. Ed. 2d 284, 291, 91 S. Ct. 1780, 1785-86.) Under this construction, the statute in question is not overly broad, as it applies only to those words which by their very utterance tend to incite an *immediate* breach of the peace. (*Chaplinksy v. New Hampshire* (1942), 315 U.S. 568, 571-72, 86 L. Ed. 1031, 1035, 62 S. Ct. 766, 769; *Cantwell v. Connecticut* (1940), 310 U.S. 296, 309-10, 84 L. Ed. 1213, 1220-21, 60 S. Ct. 900, 905-06.) We turn, therefore, to the second question presented.

Section 27—2 of the Criminal Code of 1961 provides: "In all prosecutions for criminal defamation, the truth, when communicated with good motives, and for justifiable ends, shall be an affirmative defense." (Ill. Rev. Stat. 1981, ch. 38, par. 27—2.) The existence of section 27—2 in the Criminal Code is mandated by the requirements of article I, section 4, of the Illinois Constitution. The Constitution requires that "[i]n trials for libel, both civil and criminal, the truth, when published with good motives and for justfiable ends, shall be a sufficient defense." (Ill. Const. 1970, art. I, sec. 4 (the same provision was contained in article II, section 4, of the 1870 Illinois Constitution).) As

a result, these provisions constitute an affirmative defense wherein the defendant bears the burden of proving not only the truth of the defamatory statement, but also that it was uttered with good motives and for a justifiable end. (*People v. Taylor* (1917), 279 Ill. 481, 482; *People v. Fuller* (1909), 238 Ill. 116, 133; *City of Chicago v. Lambert* (1964), 47 Ill. App. 2d 151, 163.) The defendant contends that conditioning the defense of truth on the presence of these additional requirements is inconsistent with the holdings of *New York Times Co. v. Sullivan* (1964), 376 U.S 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, and subsequent Supreme Court cases. As noted above, the trial court agreed with the defendant and declared the entire criminal defamation statute (Ill. Rev. Stat. 1981, ch. 38, par. 27–1 *et seq.*) unconstitutional on that basis. For the reasons that follow, we believe the trial court erred.

In *New York Times*, the court required a showing of "actual malice" in a *civil* defamation action where the defamatory statement concerned a public official and related to his official conduct. Actual malice was defined, therein, as knowledge of falsity or reckless disregard of truth or falsity. (*New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) Under the *Times* standard, the burden is on the "public official" plaintiff to plead and prove either knowing falsity or reckless disregard for the truth. Consequently, where the *Times* standard applies, the inconsistent burden of proving truth, good motives and justifiable ends may not be placed upon the defendant. See *Farnsworth v. Tribune Co.* (1969), 43 Ill. 2d 286, 290.

The holding of *New York Times* was extended to the area of *criminal* defamation in *Garrison v. Louisiana* (1964), 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209. In

Garrison, the court held that, despite the differing history and purpose of criminal libel, the *New York Times* rule applied to criminal defamation as well as civil and, thus, limited a State's power to impose criminal sanctions for criticism of a public official. As the court stated:

> "Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations." *Garrison v. Louisiana* (1964), 379 U.S. 64, 67, 13 L. Ed. 2d 125, 129, 85 S. Ct. 209, 212.

Applying the *New York Times* rule, the court in *Garrison* struck down a Louisiana statute which, like the statute presently under review, conditioned the defense of truth on the presence of good motives and justifiable ends. After discussing the importance of open debate, where the conduct of a public official is concerned, the court announced:

> "Truth may not be the subject of either civil or criminal sanctions *where discussion of public affairs is concerned.*" (Emphasis added.) *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 133, 85 S. Ct. 209, 216.

In extending the *New York Times* rule to criminal defamation, the court expressly reserved judgment on whether the defense of truth could be limited by the additional requirements of good motives and justifiable ends where the defamation was one in which the public had no interest. (*Garrison v. Louisiana* (1964), 379 U.S. 64, 72, 13 L. Ed. 2d 125, 131, 85 S. Ct. 209, 214-15.) The court specifically stated:

> "We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels." *Garrison v. Louisiana* (1964), 379 U.S. 64, 72 n.8, 13 L. Ed. 2d 125, 131 n.8, 85 S. Ct. 209, 215 n.8.

The court subsequently addressed the constitutional limitations placed on private defamation actions in *Gertz v. Welch* (1974), 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997. In *Gertz,* the court held that so long as the States do not impose liability without fault, they may define for themselves the appropriate standard of liability for defamatory falsehoods injurious to a private individual. (418 U.S. 323, 347, 41 L. Ed. 2d 789, 809, 94 S. Ct. 2997, 3010.) In so holding the court noted that private individuals are more vulnerable to reputational injury than public officials or public figures and, therefore, found that the State's interest in protecting them was correspondingly greater. (418 U.S. 323, 344, 41 L. Ed. 2d 789, 808, 94 S. Ct. 2997, 3009.) Thus, under *Gertz,* the States were free to select their own standard of liability and were not limited by the strict *New York Times* standard of "knowing falsity" or "reckless disregard of truth or falsity," at least as far as compensatory damages in civil actions were concerned. See *Troman v. Wood* (1975), 62 Ill. 2d 184.

However, where the private plaintiff in a civil defamation action seeks punitive damages, *Gertz* requires a showing of knowing falsity or reckless disregard for the truth. (*Gertz v. Welch* (1974), 418 U.S. 323, 349, 41 L. Ed. 2d 789, 810, 94 S. Ct. 2997, 3011.) Punitive damages were defined in *Gertz* as "private fines levied by civil juries to

punish reprehensible conduct and to deter its future occurrence." 418 U.S. 323, 350, 41 L. Ed. 2d 789, 811, 94 S. Ct. 2997, 3012.

The defendant suggests that punitive damages are the civil counterpart to criminal sanctions. Since an award of punitive damages in a civil action is conditioned on the private plaintiff satisfying the rigid *New York Times* standard, the defendant contends that criminal sanctions for private defamation cannot be imposed on less. Further, the defendant argues that truth must be an absolute defense in a criminal defamation prosecution concerning a private citizen, because *Gertz* explicitly conditions the imposition of such liability on "falsehood." 418 U.S. 323, 347, 41 L. Ed. 2d 789, 809, 94 S. Ct. 2997, 3010.

However, the Supreme Court has never gone so far as to require that truth be an absolute defense in a private defamation action. The court made this very clear in *Cox Broadcasting Corp. v. Cohn* (1975), 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029. In *Cox*, the court acknowledged that it had "carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." (420 U.S. 469, 490, 43 L. Ed. 2d 328, 347, 95 S. Ct. 1029, 1044.) The fact that the above quotation is extracted from an opinion rendered after *Gertz* persuades us that the defendant has overstated the *Gertz* holding.

Further, the trial court found the statute unconstitutional, stating that this "inescapable conclusion is borne out by the decisions of every State court having occasion to consider the constitutionality of a similar provision." Yet, the cases relied upon by the trial court concerned criminal defamation prosecutions regarding either public

officials, public figures, or matters of public interest. (*Weston v. State* (1975), 258 Ark. 707, 528 S.W.2d 412 (public official); *Eberle v. Municipal Court* (1976), 55 Cal. App. 3d 423, 127 Cal. Rptr. 594 (public figure); *Commonwealth v. Armao* (1972), 446 Pa. 325, 286 A.2d 626 (public interest); *Gottschalk v. State* (Alaska 1978), 575 P.2d 289 (public official). As such, those cases involved a straightforward application of *Garrison*.

The case at bar presents a different question, as there is no suggestion that the complainant herein is either a public official or public figure. Since the guarantees of the first and fourteenth amendments have never required that truth be an absolute defense in a prosecution for criminal defamation of a private person, we find no constitutional infirmity in the application of section 27—2 to the case at bar. Consequently, we need not reach the issue of severability which was raised by the State.

For the reasons given, the judgment of the circuit court is reversed and the cause is remanded.

Reversed and remanded.

APPENDIX B

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF McLEAN

People of the State of Illinois	)	
	)	
VS.	)	Case No. 83 CM 705
	)	
Paul A. Heinrich	)	

MEMORANDUM OPINION AND ORDER

This cause having come on to be heard on October 7, 1983, on the Motion of defendant to Dismiss the Informations, defendant appearing by counsel, John Tielsch, and the People appearing by Assistant State's Attorney Todd Greenberg, the Court, having heard the arguments of counsel and considered the authorities submitted in support thereof, being now fully advised in the premises, finds as follows:

Defendant's motion challenges the constitutionality of the Criminal Defamation Statute, Ill. Rev. Stat. ch. 38, section 27:

> "27-1. Elements of the Offense. (a) A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace.
>
> (b) Sentence.
>
> Criminal defamation is a Class A misdemeanor. Amended by P.A. 77-2638, section 1, eff. Jan. 1, 1973.

> 27-2. Justification. In all prosecutions for criminal defamation, the truth, when communicated with good motives, and for justifiable ends, shall be an affirmative defense."

The law is a reflection of the so-called "qualified truth" defense embodied in the Illinois Constitution*:

> ". . .; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Ill. Const., 1970, Art. I, Sec. 4

Our Supreme Court has found this provision of the Illinois Constitution federally unconstitutional "to the extent that it would require a defendant who had published statements about public affairs or of public interest and concern to prove that they were true, and published with good motives and justifiable ends." *Farnsworth V. Tribune Company,* 43 Ill. 2d 286 at 292 (1969).

The question posed by defendant's motion at bar is of first impression here only insofar as it would extend the doctrine of *Farnsworth,* applying the standards enunciated in *New York Times V. Sullivan,* 376 U.S. 254 (1964), and *Garrison V. Louisiana,* 379 U.S. 64 (1964), to purely "private libels" between private individuals.

The holding of the United States Supreme Court in *Gertz V. Welch,* 418 U.S. 323 (1974), finds First Amendment intrusion by State law which would impose liability for libel without fault, i.e. without proof of an intentional, knowing or reckless disregard for the truth. By the

---

*The 1970 Constitutional Convention opted to carry over the pertinent language almost *verbatim* from the constitution of 1870, primarily because of the Convention Committee's desire to make no change in existing rules governing circumstances in which truth is a defense. See: Committee Proposals of the Constitutional Convention of 1970.

logic of the *Gertz* decision, the cornerstone of culpability for libel rests on the declarant's knowledge of the falsity of his assertions; and a statute which purports to impose criminal responsibility for libel of a private victim is constitutionally proscribed unless it is based on the declarant's lack of a reasonable basis to believe his declaration is true.

The inescapable conclusion is borne out by the decision of every State Court having occasion to consider the constitutionality of a similar provision. *Weston V. State,* 528 S.W. 2d 412 (Ark., 1975); *Eberle V. Municipal Court, Los Angeles Judicial Dist.,* 55 Cal. App. 3d 423 (1976), *Commonwealth V. Armao,* 286 A. 2d 626 (Pa, 1972); *Gottschalk V. State,* 575 P. 2d 289 (Alaska, 1978)

The State has urged in the case at bar that the offending statute is severable and that the constitutionality of Ill. Rev. Stat. Ch. 38, Sec. 27-1 may be saved. While mindful of the general rule that a statute must be saved if it is susceptible of a constitutional construction, the State's position here must be rejected.

> " 'The Commonwealth urges us to in effect redraft the criminal libel statutes in accordance with First Amendment requirements. To accede to this request would be to undertake a wholly inappropriate judicial activity amounting to judicial legislation.' " *Weston V. State, supra* at 416 citing *Commonwealth V. Armao, supra.*

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Ill. Rev. Stat. ch. 38, sec. 27 is declared to be unconstitutional in contravention of the First and Fourteenth Amendments to the Constitution of the United States; and

IT IS FURTHER ORDERED that defendant's said Motion to Dismiss should be and is allowed.

Dated this 14 day of Oct., 1983.

ENTER: /s/ William DeCardy
-Judge-

FILED
Oct 14 1983
Circuit Court
McLean County

APPENDIX C

FORM NO. 8

State of Illinois
Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of September, 1984.

Present: Howard C. Ryan, Chief Justice

Justice Robert C. Underwood	**Justice Daniel P. Ward**
Justice Joseph H. Goldenhersh	**Justice William G. Clark**
Justice Thomas J. Moran	**Justice Seymour Simon**

On the 20th day of September, 1984, the Supreme Court entered the following judgment:

People State of Illinois,
Appellant

No. 59239 v.

Paul Heinrich,
Appellee

Appeal from
Circuit Court
McLean County
83 CM 705

The order on appeal is REVERSED, and this cause is REMANDED to the Circuit Court McLean County for further proceedings consistent with the opinion of this Court, a copy of which is attached hereto.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 7th day of December, 1984.

/s/ Juleann Hornyak
Clerk,
Supreme Court of the State of Illinois.

FILED
DEC 10 1984
CIRCUIT CLERK
McLEAN COUNTY

APPENDIX D

No. 59239
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant,	)	Direct Appeal from the Appellate Court, Fourth District
vs.	)	Original Appeal from the Circuit Court, Eleventh Judicial Circuit, McLean County, Illinois No. 83-CM-705
PAUL HEINRICH, Defendant-Appellee,	)	Honorable William DeCardy, Judge Presiding.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul Heinrich, the above named defendant-appellee, hereby appeals to the Supreme Court of the United States from the final judgment filed and entered on December 7, 1984 reversing and remanding the judgment of the Circuit Court, Eleventh Judicial Circuit filed on October 14, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257.

Respectfully submitted,

William P. Marhsall
Marshall-Wythe School of Law
College of William and Mary
Williamsburg, VA 23185

Jeffrey M. Shaman
DePaul University College of Law
25 East Jackson Blvd.
Chicago, IL 60604

FILED
February 5, 1985
Supreme Court Clerk

APPENDIX E1

STATE OF ILLINOIS) IN THE CIRCUIT COURT OF THE
COUNTY OF McLEAN) ELEVENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLINOIS)
)
vs) No. 83-CM-705
)
Paul A. Heinrich)
DEFENDANT)
702 W. Mulberry)
Bloomington, Il. 61701)

FILED
May 11 1983
Circuit Court
McLean County

INFORMATION

COUNT I. The STATE'S ATTORNEY of McLean County, Illinois, in the name and by the authority of the People of the State of Illinois charges that Paul A. Heinrich on or about the 20th day of February, 1983, at Bloomington and Normal in the County of McLean, State of Illinois, committeed the offense of Criminal Defamation in that he knowingly while acting with the intent to defame another, namely Melissa Sue Estes, communicated to members of the general public matter which tends to provoke a breach of the peace, by distributing by mail and by posting in the public view a leaflet a copy of which is attached hereto and made a part hereof. Said leaflet was printed in McLean County, Illinois in violation of Section 27-1, Chapter 38, Illinois Revised Statutes (1981). A Class A misdemeanor.

/s/ Todd Greenberg
State's Attorney

The undersigned, on oath, states that the facts set forth in the foregoing information are true in substance and matter of fact, to the best of his knowledge, information and belief.

DESCRIPTION		
D.O.B.	SEX	RACE
8/11/56	M	W

/s/ Todd Greenberg
Complainant

Subscribed & sworn to before me this 11th day of May, 1983.
/s/
Notary Public

Information filed this 11th day of May, 1983. (Warrant) (Notice) issued to _____
People request bond be set at _____ (10% rule).
Orginating Agency _____

white:Clerk yellow:Defendant pink:State's Attorney goldenrod:Agency

CONCERNED CITIZEN

A matter of utmost importance has come to my attention. MELISSA SUE ESTES, daughter of DELMAIN and BETTY ESTES of Rural Route 1 Emington, Illinois, has proven herself unwilling and unable to accept the responsibility for the care and moral development of her bastard child known as ELIZIBETH FRANCIS MARIE ESTES.

MELISSA SUE ESTES

My opinion is based on the following facts:

LISA ESTES has been known to fornicate with a variety of men.

LISA ESTES is known to have conceived FOUR CHILDREN OUT OF WEDLOCK.

Her first pregnancy, which occured when Lisa was just fourteen years old, was fathered by TOM and it resulted in the birth of the child called LIZZIE. Her second and third pregnancys were fathered by CHUCK and were terminated by clinical abortions.
Her fourth pregnancy was fathered by PAUL and was terminated by miscarriage.

LISA ESTES has been known to have sexual relations with men on the first date.

LISA ESTES has been known to practice oral sex and other deviate sexual acts.

LISA ESTES has been known to use illicit drugs.

BEST AVAILABLE COPY

Concerned citizen, I ask you: Is Lisa's behavior normal?

Will Lisa's immoral conduct adversely affect the moral and spiritual development of her seven year old child?

Since Delmain and Betty Estes failed to raise their own daughter to be morally sound, should they be allowed to raise Lizzie in the same way?

Concerned citizen, I urge you to investigate this matter on your own and come to your own conclusions. It is your duty to protect America's youths because they cannot protect themselves.

The fate of LIZZIE ESTES is in your hands and I know you will do everything in your power to prevent the moral and spiritual destruction of such an innocent child.

LIZZIE ESTES must not be forced to pay for her mother's deviate moral behavior!

Please, help her! Contact your local church group or the Illinois Department of Children and Family Services at 1-800-252-2873 before it is too late!

THANK YOU

FILED
MAY 11 1983
CIRCUIT CLERK
McLEAN COUNTY

APPENDIX E2

STATE OF ILLINOIS)
COUNTY OF McLEAN) IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLINOIS)
)
vs) No. 83-CM-705
)
Paul A. Heinrich)
DEFENDANT)
702 W. Mulberry)
Bloomington, Il. 61701)

FILED
May 11 1983
Circuit Court
McLean County

INFORMATION

COUNT II. The STATE'S ATTORNEY of McLean County, Illinois, in the name and by the authority of the People of the State of Illinois charges that Paul A. Heinrich on or about the 19th day of February, 1983, at Bloomington in the County of McLean, State of Illinois, committed the offense of Criminal Defamation in that he knowingly while acting with the intent to defame another, namely Melissa Sue Estes, communicated to Betty Estes matter which tends to provoke a breach of the peace, namely, a letter, a copy of which is attached hereto and made a part hereof. The letter was mailed to Betty Estes and was typed in McLean County, Illinois in violation of Section 27-1, Chapter 38, Illinois Revised Statutes (1981). A Class A. misdemeanor.

/s/ Todd Greeberg
State's Attorney

The undersigned, on oath, states that the facts set forth in the foregoing information are true in substance and matter of fact, to the best of his knowledge, information and belief.

DESCRIPTION		
D.O.B.	SEX	RACE
8/11/56	M	W

/s/ Todd Greenberg
Complainant

Subscribed & sworn to before me this 11th day of May, 1983.
/s/
Notary Public

Information filed this 11th day of May, 1983. (Warrant) (Notice) issued to _____
People request bond be set at _____ (10% rule).
Orginating Agency _____

white:Clerk yellow:Defendant pink:State's Attorney goldenrod:Agency

Betty:

Think about what you said to me about being pretentious.

You're the mother of a whore and the grandmother of a bastard. You're the tit-less wonder who wears low-cut dresses to show off the breasts you pretend to have.
You're the white trash who lives in a filthy house fit for pigs.
You're the mother of a girl who has been ex-communicated from the Catholic Church for murdering human life.
You're the woman who taught Lisa evrything (sic) she knows about morality.
You're the woman who will probably raise Lizzie to be a whore just like her mother.

As long as I live I'll do everything I can to prevent you from ruining Lizzie like you ruined Lisa.
I hope to God you take me to court for distributing the enclosed newsletter so I can legally prove to the whole world that you and your family are unfit to raise vermin let alone innocent children.

Better yet, come after me and you can rot in jail for the rest of your miserable life. Why not? You're going to rot in Hell anyway so you might as well get used to it now!

/s/ Paul Heinrich

FILED
May 11 1983
Circuit Court
McLean County

Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL HEINRICH,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

NEIL F. HARTIGAN
Attorney General, State of Illinois
JILL WINE-BANKS
Solicitor General, State of Illinois
MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Appellee

DAVID E. BINDI
Assistant Attorney General
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (R.O. 88808—50—4-3-85)

BEST AVAILABLE COPY

19pp

QUESTIONS PRESENTED

1. Whether this appeal should be dismissed because appellant's second question presented for review was not pressed or passed upon below, thereby depriving this Court of jurisdiction?

2. Whether this appeal should be dismissed because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C. § 1257, thereby depriving this Court of jurisdiction?

3. Whether this appeal should be dismissed since it raises no substantial federal question which merits this Court's review?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS:	
I.	
THIS COURT LACKS JURISDICTION TO CONSIDER APPELLANT'S SECOND QUESTION PRESENTED FOR REVIEW, SINCE HE FAILED TO PRESENT THAT QUESTION TO THE ILLINOIS SUPREME COURT	2
II.	
THIS COURT LACKS JURISDICTION, SINCE THE JUDGMENT OF THE ILLINOIS SUPREME COURT IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257	3
III.	
SINCE THE QUALIFIED TRUTH DEFENSE CONTAINED IN THE ILLINOIS CRIMINAL DEFAMATION STATUTE IS CONSISTENT WITH FIRST AMENDMENT PRINCIPLES AND THIS COURT'S FIRST AMENDMENT DECISIONS, NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED	8
IV.	
NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY APPELLANT'S CLAIM THAT THE STATUTE IS OVERBROAD AS REACHING DEFAMATORY STATEMENTS NOT SPOKEN IN FACE-TO-FACE CONFRONTATION WITH THE PERSON DEFAMED, SINCE THIS COURT HAS NEVER IMPOSED SUCH A REQUIREMENT	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	PAGE
Bateman v. Arizona, 429 U.S. 1302 (1976)	3
Beauharnais v. Illinois, 343 U.S. 250 (1952)	9, 10, 12
Calder v. Jones, ____ U.S. ____, 104 S.Ct. 1482 (1984)	7
Cantwell v. Connecticut, 310 U.S. 296 (1940)	12
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	12
Cohen v. California, 403 U.S. 15 (1971)	13
Construction Laborers v. Curry, 371 U.S. 542 (1963)	7
Cox v. Louisiana, 379 U.S. 536 (1965)	13
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	4, 5, 6, 7, 10, 11
Davis v. O'Hara, 266 U.S. 314 (1924)	6
Edwards v. South Carolina, 372 U.S. 229 (1963) ..	13
Feiner v. New York, 340 U.S. 315 (1951)	13
Flynt v. Ohio, 451 U.S. 619 (1981)	3, 4, 8
Garrison v. Louisiana, 379 U.S. 64 (1964)	8, 9
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ..	9, 10, 11
Gooding v. Wilson, 405 U.S. 518 (1972)	12, 13
Gregory v. Chicago, 394 U.S. 111 (1969)	13
Hathorn v. Lovorn, 457 U.S. 255 (1982)	6
Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983)	2

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 7
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 7
Mills v. Alabama, 384 U.S. 214 (1966) 5
National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) 8
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 8, 9
Parr v. United States, 351 U.S. 513 (1956) 4
People v. Heinrich, 104 Ill. 2d 137, 470 N.E.2d 966 (1984) 2, 3, 9, 12
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 3
Reece v. Georgia, 350 U.S. 85 (1955) 6
Roth v. United States, 354 U.S. 476 (1957) 11
Shaffer v. Heitner, 433 U.S. 186 (1977) 7
Southland Corp. v. Keating, ____ U.S. ____, 104 S.Ct. 852 (1984) 7, 8
Time, Inc. v. Firestone, 424 U.S. 448 (1976) 10

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. I 3, 8, 9, 11, 13
U.S. CONST. amend. XIV 3

STATUTORY PROVISIONS:

28 U.S.C. § 1257 3
Ill. Rev. Stat. 1983, ch. 38, par. 27-1 ..... 2, 3, 12, 14
Ill. Rev. Stat. 1983, ch. 38, par. 27-2 ..... 2, 3
Ill. Rev. Stat. 1983, ch. 110A, par. 341 2

In The

Supreme Court of the United States

October Term, 1984

PAUL HEINRICH,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

Appellee, the People of the State of Illinois, now moves this Court to dismiss the appeal of appellant Paul Heinrich. Appellee so moves because: 1) appellant's second question presented for review was not pressed or passed upon below, thereby depriving this Court of jurisdiction; 2) the judgment from which appeal is sought is not a final judgment within the meaning of 28 U.S.C. § 1257, thereby depriving this Court of jurisdiction; and 3) the appeal does not present a substantial federal question worthy of review by this Court.

I.

THIS COURT LACKS JURISDICTION TO CONSIDER APPELLANT'S SECOND QUESTION PRESENTED FOR REVIEW, SINCE HE FAILED TO PRESENT THAT QUESTION TO THE ILLINOIS SUPREME COURT.

Appellant's second question presented for review is "[w]hether the First Amendment permits a state to criminally proscribe *true* statements of fact as fighting words or breach of the peace where the speech was not uttered in face-to-face confrontation?" (Jurisdictional Statement at i) The Illinois Supreme Court did not rule on this question (*See, People v. Heinrich*, 104 Ill. 2d 137, 470 N.E.2d 966 (1984)), because appellant did not raise it in that court. Rather, he challenged the constitutionality of the criminal defamation statute, *Ill. Rev. Stat.* 1983, ch. 38, pars. 27-1 and 27-2, on the ground that it is unconstitutionally overbroad inasmuch as it contains no requirement that the defamatory communication tend to provoke an *immediate* breach of the peace. The immediacy issue was argued to the exclusion of any claim that a face-to-face confrontation is constitutionally required. The first mention of such a requirement comes in the petition for rehearing. Since Illinois Supreme Court Rule 341(e)(7), [*Ill. Rev. Stat.* 1983, ch. 110A, par. 341(e)(7)] prohibits raising points for the first time in a petition for rehearing, the court below was precluded from considering whether face-to-face confrontation is required.

Because appellant's second question presented for review was not raised or passed upon below, it is not within this Court's jurisdiction. *Illinois v. Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983).

II.

THIS COURT LACKS JURISDICTION, SINCE THE JUDGMENT OF THE ILLINOIS SUPREME COURT IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257.

On May 11, 1983, appellant was charged by information with two counts of criminal defamation, in violation of *Ill. Rev. Stat.* 1983, ch. 38, par. 27-1. The Circuit Court of McLean County granted his pre-trial motion to dismiss the charges on the ground that the statute, which provides that truth is an affirmative defense only when communicated with good motives and for justifiable ends (*Ill. Rev. Stat.* 1983, ch. 38, par. 27-2), is unconstitutional under the First and Fourteenth Amendments. The Illinois Supreme Court reversed, finding that the statute applies only to speech which tends to incite an immediate breach of the peace, and that the qualified truth defense is not inconsistent with this Court's First Amendment decisions. The case was remanded for trial. *People v. Heinrich*, 104 Ill. 2d 137, 470 N.E.2d 966 (1984). Appellant now invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(2).

The jurisdiction conferred by § 1257 to review state court decisions is limited to "[f]inal judgments" of the highest court of the state in which a decision may be had. Generally, the finality requirement precludes review in this Court where further proceedings in the state courts, other than those of a ministerial nature, are ordered by the judgment from which appeal is sought. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In criminal cases, a judgment is ordinarily not final, within the meaning of § 1257, unless it includes the imposition of a sentence. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *Bateman v. Arizona*, 429 U.S. 1302, 1306 (1976) (Rehn-

quist, J., Circuit Justice); *Parr v. United States*, 351 U.S. 513, 518 (1956). Here, appellant has not yet been tried, convicted, or sentenced.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized that under certain limited circumstances, state court judgments are treated as final despite the fact that they are interlocutory in nature and call for further substantive proceedings to take place. Four categories were identified and described. However, the Court observed that "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date . . ." 420 U.S. at 477. Such is not the case here. At least two federal questions will most likely arise on remand to the trial court: whether the defamatory utterance must be made in face-to-face confrontation with the person defamed[1]; and whether the defamatory utterances in this case are of such virulent quality as to give rise, under the circumstances of their communication, to an immediate breach of the peace.[2] Thus, unless this appeal is dismissed, the risk arises that resolution of the federal questions necessary to a final determination of appellant's case will be arrived at in piecemeal fashion. *See, e.g., Flynt*, 451 U.S. at 621.

---

[1] This is appellant's second question presented for review in this Court. However, since the question was neither pressed nor passed upon below, it is beyond this Court's jurisdiction. (*See*, Part I, *supra*). It would be logical to assume that, on remand, appellant will seek resolution of this issue.

[2] The charges against appellant allege that his defamatory communications were of such character. However, since the case has not yet gone to trial, appellee has not yet had the opportunity to present any evidence regarding the circumstances surrounding the dissemination of the leaflet and letter. Certainly, the evidence which would come out at the trial of this case will be indispensable to the determination of the tendancy of appellant's utterances to provoke a breach of the peace.

Moreover, this case does not fit within any of the categories discussed by this Court in *Cox*. The first is described as "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Cited as an example was *Mills v. Alabama*, 384 U.S. 214 (1966), where the appellant had no defense to the criminal charge other than his federal claim, and could not prevail on remand on any non-federal ground. Here, appellant has a state law ground on which to base a defense—that his defamatory utterances are true, and were communicated with good motives and for justificable ends. The result on remand, therefore, is not preordained.

In the second category are cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. Again, this is not the case here, since appellant's trial may result in a finding that the statements he published were not, in fact, true. Such a finding would obviate the federal questions he presents.

The third category includes

> those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts yet to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

420 U.S. at 481. It is true that if appellant were acquitted on remand, the federal issues would be mooted. However, if convicted, he would ultimately be able to obtain review in this Court of the federal issues he now presents, even if the state courts declined to reconsider what the Illinois Supreme Court has already decided. This Court has often taken jurisdiction on certiorari to decide issues determined at earlier stages of the state court proceedings, "and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case . . ." *Reece v. Georgia*, 350 U.S. 85, 87 (1955). *Accord, Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982); *Davis v. O'Hara*, 266 U.S. 314, 321 (1924). Thus, the questions presented here would survive the remand if appellant is convicted.

The fourth and final category is the only one arguably applicable here. It includes cases

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483. It is true that if, on remand, appellant prevails on the merits on a nonfederal ground,

review of the federal issues would be unnecessary. It is also true that reversal of the Illinois Supreme Court would be preclusive of any further litigation. The question then becomes whether refusal to grant immediate review would "seriously erode federal policy."

As examples of cases which fall within this category, the *Cox* opinion lists *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), and *Construction Laborers v. Curry*, 371 U.S. 542 (1963). Each involved significant and important federal policies. The issue in *Tornillo* concerned the constitutionality of a state statute which required the media to publish a reply to an editorial critical of a candidate for public office, at the candidate's insistence. Thus, *Tornillo* involved " 'an important question of freedom of the press under the First Amendment' ", 418 U.S. at 247, n.6, while in this case, the issue concerns only the more discrete area of private defamation. In both *Langdeau* and *Curry*, other considerations besides the importance of the federal issue influenced the Court's decision, since in both cases the federal issue was separable from the merits and ripe for review. *See, Cox*, 420 U.S. at 483-485. Such is not the case here.

Similarly, in the decisions which follow *Cox*, this Court relied heavily on considerations above and beyond the significance of the federal question. *Calder v. Jones*, ____ U.S. ____, 104 S.Ct. 1482, 1484-1486 (1984) (federal issue was whether First Amendment considerations effected exercise of *in personam* jurisdiction over out-of-state publisher in defamation action, and if review not granted defendant would have to appear generally and waive jurisdictional defect); *Shaffer v. Heitner*, 433 U.S. 186, 195, n.12 (1977) (same); *Southland Corp. v. Keating*, ____ U.S.

____, 104 S.Ct. 852, 856-857 (1984) (California statute nullifying arbitration clause in contract between parties would be reviewed since, if parties forego arbitration and resort to court, federal issue would escape review); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (federal issue collateral to merits and ripe for review). On the other hand, where, as here, the federal question will survive the remand, and other federal questions may arise following the remand, this Court has postponed review until after the trial on the merits. *Flynt v. Ohio, supra.*

For these reasons, this Court should dismiss the appeal for want of jurisdiction.

III.

SINCE THE QUALIFIED TRUTH DEFENSE CONTAINED IN THE ILLINOIS CRIMINAL DEFAMATION STATUTE IS CONSISTENT WITH FIRST AMENDMENT PRINCIPLES AND THIS COURT'S FIRST AMENDMENT DECISIONS, NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[3] which the First Amendment embodies, this Court has held that statements published concerning a public official or public figure which are true may not result in the imposition of civil liability or criminal penalties against the speaker. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964). In so holding, however, this

[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Court expressly recognized that the considerations which prompted the *New York Times* decision—the interest in free and open debate on public issues—do not necessarily apply in the area of private defamation, where public affairs are not involved. *Garrison*, 379 U.S. at 72, n.8. Indeed, this Court had earlier held that the qualified truth defense to a criminal charge of private defamation was not unconstitutional. *Beauharnais v. Illinois*, 343 U.S. 250, 265-266 (1952). While *New York Times* and the subsequent public official and public figure cases have the effect of making *Beauharnais* inapplicable in that context, *Beauharnais* has never been overturned in the context of private defamation.

Appellant argues (Jurisdictional Statement at 7-8) that in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court held that liability for defamation of a private individual must be predicated on "defamatory falsehood." 418 U.S. at 347. As the Illinois Supreme Court correctly noted (104 Ill.2d at 149), appellant overstates the holding in *Gertz*. In the first place, the issue before this Court was a narrow one: "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements." 418 U.S. at 332. The falsity of the publication in *Gertz* was never in question, and so the opinion has no bearing on whether the States may criminally proscribe, consistent with the First Amendment, true defamatory statements, maliciously published. The holding in *Gertz* was that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 346-347. Tailored to

the issue presented, this holding simply says nothing about whether the falsity of the publication is an indispensable element of a private defamation action.

In the second place, this fact was confirmed a year later when this Court stated it had "carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975). Appellant attempts to avoid the clear import of this statement in *Cox* by reference to a passing observation made in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) that "demonstration that an article was true would seem to preclude finding the publisher at fault . . ." 424 U.S. at 458. This, however, was no part of the decision in *Firestone*, since this Court's analysis of the issues there was predicated on its acceptance of the jury's finding that the publication was in fact false. *Id.* It cannot be assumed that with one sentence of dicta, this Court meant to close the question it had "carefully left open", *Cox, supra*, and completely overturn *Beauharnais* and "[t]he teaching of a century and a half of criminal libel prosecutions in this country . . ." *Beauharnais*, 343 U.S. at 265.

Finally, appellant asserts that the holding in *Gertz* that punitive damages may not be awarded in civil defamation cases unless the stringent standards of *New York Times* are met is "conclusive here." (Jurisdictional Statement at 8) He argues that punitive damages are the civil counterpart to criminal sanctions, and since they may not be imposed without a showing of falsehood and actual malice, then criminal sanctions may not be imposed upon a lesser showing. Again, this argument is belied by the

statement in *Cox*, the year after *Gertz* was decided, that the Court had not declared truth to be an absolute defense in private defamation cases. Moreover, the Court's concern in *Gertz* was with the near-limitless discretion juries have in awarding punitive damages, and the injustice of "securing for plaintiffs such as this gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349. This rationale does not logically extend to the purposes of criminal sanctions, and is therefore not conclusive here.

The First Amendment's guarantee of freedom of expression "was fashioned to ensure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Statements about a private individual concerning her personal life, uttered with the intent to cause injury and for malicious purposes, even if true, play no role in this constitutional framework. To adopt the position advanced by appellant would serve no compelling constitutional interest, and would open up the personal lives of every citizen to public inspection, ridicule, and contempt. Because the holding of the Illinois Supreme Court is consistent with First Amendment principles and with this Court's First Amendment decisions in the discrete area of private defamation, no substantial federal question is presented.

IV.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY APPELLANT'S CLAIM THAT THE STATUTE IS OVERBROAD AS REACHING DEFAMATORY STATEMENTS NOT SPOKEN IN FACE-TO-FACE CONFRONTATION WITH THE PERSON DEFAMED, SINCE THIS COURT HAS NEVER IMPOSED SUCH A REQUIREMENT.

In construing the reach of paragraph 27-1, the Illinois Supreme Court found that the statute "applies only to those words which by their very utterance tend to incite an *immediate* breach of the peace." 104 Ill.2d at 145 (emphasis in original). Such utterances have never been held to enjoy constitutional protection. *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Appellant argues that, even under the Illinois Supreme Court's interpretation, the statute is unconstitutionally overbroad because, whether viewed as a "fighting words" statute or a breach of the peace statute, it does not require face-to-face confrontation with the person defamed. The absence of this requirement, according to appellant, is fatal to the statute under this Court's decisions since without face-to-face confrontation there can be no threat of an "immediate" breach of the peace.

As set forth in Part I, *supra*, this argument is not properly before this Court since it was neither pressed nor passed upon below. In the Illinois Supreme Court, appellant argued only that the statute lacks a requirement of showing that the defamatory speech tended to provoke an immediate breach of the peace, not that without face-to-face confrontation there could be no immediacy.

Moreover, none of the decisions of this Court cited by appellant impose such a requirement. *Gooding v. Wilson*,

405 U.S. 518 (1972) holds only that a Georgia statute making it a crime to use offensive words tending to provoke a breach of the peace was overbroad because, as construed by the state courts, "offensive" language was not limited to language beyond the protection of the First Amendment. Therefore, this Court had no occasion to decide whether face-to-face confrontation is a constitutionally necessary element. Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), the narrow issue decided was whether a particular word was *per se* so offensive that the state should be permitted to remove it from the public vocabulary either because it was inherently likely to cause a breach of the peace, or upon a general theory or morality. 403 U.S. at 22-23. Even more inapposite are *Gregory v. Chicago*, 394 U.S. 111 (1969), *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Feiner v. New York*, 340 U.S. 315 (1951), each of which involved the protection afforded unpopular political speech against adverse crowd reaction. In these cases, the form of speech involved was unquestionably protected under the First Amendment. *Gregory*, *Cox*, and *Edwards* all involved peaceful protests against racial segregation, and *Feiner* involved a political speech. Defamation of a private individual does not share the First Amendment protection afforded such conduct.

Indeed, the only constitutional protection to which appellant asserts his conduct was entitled is that afforded truthful statements. He says "[a]t issue in this case are truthful statements." (Jurisdictional Statement at 13) But there has never been a judicial determination that what appellant published is true. It is not a fact that this Court can take cognizance of. If appellant wishes this Court to review the questions he presents, then it can only be done after a factual record has been developed at trial.

The Illinois Supreme Court has construed paragraph 27-1 in a manner which renders it constitutionally sound. Whether the statute applies to appellant's conduct is a matter which must be left to the State courts, where it can be determined precisely what that conduct was. If, after trial, the federal issues remain, then they can be reviewed on the basis of a complete record, instead of on the basis of assumed facts. Accordingly, no substantial federal question is presented at this time, and the appeal should be dismissed.

CONCLUSION

For all the foregoing reasons, appellee respectfully requests that this Court dismiss the appeal.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

JILL WINE-BANKS
Solicitor General, State of Illinois

MARK L. ROTERT*
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Appellee

DAVID E. BINDI
Assistant Attorney General
Of Counsel

* Counsel of Record

April 3, 1985